United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22,296

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

CARPENTERS UNION LOCAL 180,
UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA, AFL-CIO,

Respondent.

On Petition for Enforcement of An Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board, pursuant to Section 10(c) of the National Labor Relations Act, as amended (61 Stat.

136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order (R. 68-69)[2] issued against respondent on January 16, 1967, and reported at 162 NLRB No. 92. This Court has jurisdiction of the proceeding under Section 10(e) of the Act, the unfair labor practices having occurred in Vallejo, California.

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly, the Board found that the respondent violated Section 8(b)(2) and (1)(A) of the Act by refusing in the operation of an exclusive employment referral system to register three members of sister locals on its out-of-work list promptly upon their request for such registration. The evidence upon which the Board based its findings is as follows:

Paul C. Allen and Richard A. Allen, father and son, are millwrights by trade. They reside in Sacramento, California, and hold membership in Sacramento Carpenters' Local No. 1051, a sister local of the respondent local (R. 24; Tr. 17, 105). On the morning of August 23, 1965,[3] between 9:30

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[1] The pertinent statutory provisions are set forth in Appendix A, *infra.*

[2] References designated "R" are to Volume I of the record as reproduced, pursuant to Rule 10 of this Court. "Tr." references are to the reporter's transcript of testimony as reproduced in Volume II of the record. References to the General Counsel's exhibits are designated "G.C. Exh."

[3] All events described hereinafter occurred during 1965.

and 10:00 a.m., the Allens went to respondent's hall in Vallejo, California, to register for work. Paul Allen told respondent's then financial secretary, Lloyd M. Johnston, that he and his son were millwrights and would like to get on the out-of-work list (R. 24; Tr. 18, 105). Johnston told the Allens that he could not put them on the list, that they would have to talk with Business Representative Leshe, and "that was up to Mr. Leshe" to do (R. 25; Tr. 21). When Paul Allen protested, Johnston declared, "I will put your names down on a piece of paper, and if Mr. Leshe wants you to go to work and puts you on the out-of-work list, that's his job . . . I am only doing as I am told" (R. 24; Tr. 19). Financial Secretary Johnston thereupon wrote the names of both Allens, together with their telephone numbers, on a small piece of "scratch" paper which he posted on the wall (R. 24; Tr. 19, 118).

Johnston also told the Allens that respondent regularly referred millwrights to available jobs from its out-of-work carpenter list; but that there were no out-of-work millwrights currently registered (R. 25; Tr. 21, 106). When the Allens requested a chance to see respondent's out-of-work list, Johnston said the local did not "give . . . out" the list (R. 25; Tr. 21, 22, 107). When questioned by the Allens regarding American Home Products' Vacaville, California, construction project, Johnston stated that there would be work for millwrights, but that such work would not be ready for awhile. Upon leaving respondent's hall, the Allens visited the Vacaville job site and were told that the millwright work would start several weeks later (R. 25; Tr. 22, 48, 106).

On the morning of August 30, at approximately 9:30 or 10:00 a.m., the Allens, together with Dick J. Look, another Sacramento resident and Local 1051 member, visited respondent's hall. Look, with both Allens close behind, spoke to McGrogan, the new financial secretary. After asking for Leshe and learning that he was not in, Look asked to see the out-of-

work list and his request was denied (R. 25, 26; Tr. 169). He then asked to sign the out-of-work list but McGrogan said, "No, you can't sign the out-of-work list unless you deposit your book with this local . . . Well, this is the way we run things here" (R. 26; Tr. 59, 108-109). McGrogan, however, took Look's name and telephone number and added them to the posted piece of paper which Johnston had used, one week previously, to record the Allens' names.

Paul Allen, then, likewise asked to see respondent's out-of-work list, but McGrogan refused, stating, "I don't show the out-of-work list to just everybody" (R. 26; Tr. 169). He added, "It is up to Bill Leshe as to whether you go to work and [to] put you on the out-of-work list." McGrogan also stated that he could only add the names of Local 180 members to the list, and that the Allens and Look would have to "put their books in" with respondent, *i.e.*, transfer their memberships, in order to get on respondent's out-of-work list (R. 26; Tr. 26, 109).

When they left respondent's hall, the Allens and Look drove to the Vacaville project site. There they spoke with Merle Ross, Golden State Runway's[4] millwright foreman, regarding the possibility of work. Ross declared that he would

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[4] Golden State Runway and Engineering Company (herein Golden State) was a subcontractor on the Vacaville site, engaged in manufacturing and installing conveyors for a food processing plant that was under construction. The general contractor was Bigge Drayage Company, which, through its membership in the regional chapter of Associated General Contractors, Inc., is party to a labor agreement with the United Brotherhood of Carpenters and Joiners of America, AFL-CIO on behalf of the latter organization's district councils and local unions

(continued)

be hiring millwrights very shortly (R. 27; Tr. 27, 90). The three men told Ross that they had left their names at respondent's hall. Ross had previously known Look, and had Look's name recorded in a notebook; he added both Allens' names to his book. Ross told the men that he would determine where their names were on respondent's registration list; further, he promised to discuss their hire with Leshe. He pointed out, however, that since he had done no prior work within respondent's trade jurisdiction, he could not request respondent to dispatch particular men by name (R. 27; Tr. 27-28, 89-90, 110).

Later in the day, after the Allens and Look left respondent's hall, Arthur D. Cook, a member of a sister local, reported in search of millwright work (R. 27; Tr. 135). Cook first spoke with McGrogan, who referred him to Leshe, who was then present. Cook asked Leshe about millwright's work but Leshe replied that he had men available. Cook then asked whether Leshe would have any objection if he deposited his book with respondent. When Leshe stated that he had no objection, Cook "put in" his book and left the hall. Cook's name was promptly added to respondent's out-of-work list (R. 27; Tr. 136).

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[4] (continued from preceding page)

in Northern California (R. 23, 24; Tr. 10; G.C. Exh. 2). Golden State, in its subcontract with Bigge Drayage, agreed to be bound by all the terms of the AGC Carpenters Agreement, which includes, *inter alia,* an exclusive referral system whereby upon request from a construction contractor for a carpenter or millwright the local union with appropriate geographic jurisdiction is obligated to dispatch a "qualified and competent" workman (R. 24; Tr. 10, 13; G.C. Exh. 2, Sec. IV, pp. 4-6; G.C. Exh. 6, Sec. 19A).

During the late afternoon of August 30, Golden State's foreman, Ross, visited respondent's hall and spoke with Leshe (R. 27, 28; Tr. 91). With respect to Golden State's need for millwrights, Ross expressed his understanding that, since he had done no prior work within respondent's jurisdiction, he had no right to request men by name and was required to obtain all his millwrights through Local 180; Leshe concurred in this understanding (R. 28; Tr. 91-92). Ross inquired whether Look's name was near the top of respondent's list, stating that he would like to hire Look through the work list because he knew him to be a good man. Leslie replied that while he knew of Look's availability, he had other men who were ahead of Look, that he had already "figured out" those men who would be "good" for Golden State's project, and that there was not much chance that Ross could get Look dispatched at that time (R. 28; Tr. 92, 100). Ross finally merely told Leshe that he needed "two millwrights" forthwith, and Leshe replied that he had two men who would be dispatched (R. 28; Tr. 99, 102).

Within the next two days, respondent did dispatch two millwrights, Arthur D. Cook and Onest Wadley, pursuant to Ross' request. Thus, during mid-morning on August 31, at about 10:00 a.m., Cook, while visiting the State Employment Service office, received a telephone call from his wife reporting that respondent Local had "called" him (R. 30; Tr. 137). Cook reported to respondent's hall and McGrogan dispatched him to Golden State's Vacaville project. He reported for work at noon, and promptly went on the payroll. There were no other millwrights then at work except for Foreman Ross (*Ibid.*). On August 30, Onest Wadley, a member of respondent, was working as a carpenter with the Jordan Company on the Vacaville project. Wadley was told that respondent had a millwright position for him, and that a clearance or dispatch slip would be mailed to him forthwith (R. 29, 30; Tr. 216-217, 247-248).

On September 7, the Allens and Look visited the Vacaville project, and noted that there were two millwrights, presumably Cook and Wadley, at work. They asked Foreman Ross why they had not been called for work. Ross replied that he had visited respondent's hall "to get [them] to go to work" but had been told that respondent had two men ready for dispatch. Ross added that one of the men turned out to be Cook, who had just deposited his book with respondent and had procured his dispatch the next day (R. 30, 31; Tr. 28-30). Further, Ross told Look that he had not found the latter's name on respondent's out-of-work list (R. 31; Tr. 63).

Upon leaving the job site, Richard Allen returned home and telephoned Leshe about 10:00 that morning. Allen asked Leshe "how come our names wasn't on this [out-of-work] list?" (R. 31; Tr. 111). Allen was told that the separate "piece of paper" record, containing his name and telephone number, put him in a position just as good as, or better than, the position that registered job seekers had, so that, for practical purposes, he could consider himself registered for work (R. 31; Tr. 225-226). When Allen continued to protest the fact he was not formally registered, Leshe claimed that the reason was because he [Allen] was concurrently registered for work with two or three of respondent's sister locals (R. 31; Tr. 213).

During the morning of September 8, Richard Allen filed the charge initiating this case. That afternoon, both Allens and Look personally served respondent with a copy of the charge, which, then, specifically designated only Richard Allen as having been subjected to respondent's unfair labor practices (R. 32; Tr. 163-164, 182). Sometime during the morning on September 10, Paul Allen went to Oakland Local 102 and withdrew his membership book. He proceeded to respondent's hall

to deposit the book, presumably so that he could qualify for dispatch to millwright work at the Vacaville project. When he saw McGrogan Allen declared, "I would like to put my book in this local" (R. 33; Tr. 31). McGrogan replied, "Just a minute. Mr. Leshe is here. He will talk to you" (R. 33; Tr. 31). Leshe, holding a copy of Richard Allen's original charge, approached Paul Allen and engaged in a "heated discussion" during which Leshe proclaimed that Allen had a lot of "gall to bring his book down" in view of the charges that had been filed against respondent (R. 33; Tr. 191). After some continued "raving and ranting and cussing" by Leshe, Allen picked up his book and other papers and left the hall (R. 33; Tr. 31-32).

II. THE BOARD'S CONCLUSION AND ORDER

Upon the foregoing facts, the Board found that respondent, by refusing to register the applicants for work promptly upon their request for such registration, did so because of their failure or refusal to become members of respondent, and, thereby, violated Section 8(b)(1)(A) and (2) of the Act.

The Board ordered respondent to cease and desist from the unfair labor practices found. Affirmatively, the Board's order requires respondent to make whole the Allens and Look for any loss of pay they may have suffered as a result of the discrimination which respondent caused to be practiced against them. The order also requires the Union to send and post the customary notices.

ARGUMENT

I. SUBSTANTIAL EVIDENCE ON THE WHOLE RECORD SUPPORTS THE BOARD'S FINDING THAT RESPONDENT DISCRIMINATED AGAINST THE ALLENS AND LOOK, MEMBERS OF A SISTER LOCAL, BY REFUSING TO REGISTER THEM FOR EMPLOYMENT PROMPTLY UPON THEIR REQUESTS, WITH RESULTING LOSS OF JOB OPPORTUNITIES, THEREBY VIOLATING SECTION 8(b)(2) AND (1)(A) OF THE ACT

It is settled law that a union and its agents violate Section 8(b)(2) and (1)(A) of the Act when, under an exclusive hiring hall arrangement with an employer, it accords its own members preference in registration and job referrals over nonmembers or, as in this case, members of sister locals seeking to use its hiring facilities. *N.L.R.B. v. International Brotherhood of Electrical Workers, Local Union 340,* 301 F.2d 824 (C.A. 9); *N.L.R.B. v. Hod Carriers' and Common Laborers' Union, Local 300,* 336 F.2d 459 (C.A. 9); *N.L.R.B. v. Local 507, International Hod Carriers' Building and Common Laborers' Union,* 336 F.2d 460 (C.A. 9); *N.L.R.B. v. International Longshoremens' & Warehousemens' Union, Local 10,* 283 F.2d 558 (C.A. 9). As we show below, the record fully supports the Board's finding that respondent failed or refused to provide prompt, routine registration or dispatch to the Allens and Look, because they were not members of respondent, but of sister locals, and that this conduct was violative of the foregoing provisions of the Act.

The evidence shows that although there were no millwrights on the out-of-work list when the Allens sought to register on August 23, respondent's then-Financial Secretary, Johnston, told them that he could not personally register them, that only Leshe, Local 180's Business Representative,

could do that. The Allens, subsequently, returned to respondent's dispatch hall on August 30, accompanied by Dick Look, another sister local member. On this occasion, though there were still no millwrights on the out-of-work list (Tr. 256), they were denied registration by McGrogan, who stated that he could only add the names of Local 180 members to the list and that in order for the three of them to get on the list, they would have to "deposit" their books with respondent, that is, transfer their memberships. On both August 23 and 30, the complainants were refused permission to see the out-of-work list and their names and phone numbers were placed on a piece of "scratch" paper.

On the basis of these facts, plus Business Representative Leshe's testimony to the same effect, it is clear that respondent's practice is to require a personal confrontation between members of sister locals and Leshe before the former can be properly registered for work (R. 39; Tr. 222, 225). That this practice constitutes a significant deviation from the registration practices followed by many of respondent's Northern California sister locals is evidenced by Look's uncontroverted testimony that he had previously registered for work in several other sister locals in the region and on each occasion his request had been complied with. Moreover, he stated that at no time had he been required to deposit his book prior to registration and that in most of them he could sign the list himself or else be registered without the business representative being present (R. 39; Tr. 48, 49, 50, 51).

That such disparate treatment tended to promote a preference for Local 180 members in the referral and dispatch to jobs is clearly evidenced from the events following August 30. On August 31, subsequent to Golden State Foreman Ross' request for two millwrights, respondent dispatched Arthur Cook,

a newly transferred-in member who had registered *after* the Allens and Look were refused registration on August 30, as well as Onest Wadley, a member of Local 180 who was not then out of work and, therefore, not eligible to be on the list at the time of his telephone dispatch on August 30 (G.C. Exh. 2, 6(a) and 6(c) of Hiring Procedures).[5] Further, within two weeks thereafter, Local 180 dispatched two more millwrights to Golden State who were not on the out-of-work list when the Allens and Look attempted to register. One of them, Holley, hired on September 8, was a member of Local 180 and the other, McGuigan, hired on September 15, was a non-member who had applied for membership in Local 180 just before he was dispatched (R. 39; Tr. 81, 226-227). The record thus shows that absent respondent's unlawful refusal to register the Allens on August 23 and Look on August 30 because of their lack of membership in Local 180, these three men would have been eligible for dispatch to Golden State on August 31 (for the Allens) and September 8 (for Look).

Respondent contended, before the Board, that the requirement of a personal consultation with members of sister locals prior to registration was calculated to give Leshe a chance to dissuade such individuals from multiple job registrations for supposed "practical reasons" (R. 40; Tr. 222, 240). Leshe's account, however, of his conversation with Richard Allen on September 7 fails to support this assertion. For on that occasion, Leshe told Allen that he and his father were "*de facto*" registered as of August 30 and that he (Richard

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[5] Leshe, in seeking to explain away this favoritism shown Wadley, despite the latter's non-registration and non-eligibility, claimed that he had promised Wadley the first millwright job that became available (R. 29-30; Tr. 248).

Allen) was "better off" on the separate list rather than being formally registered, since this protected him against "delisting" for failure to be present in respondent's hall during dispatch hours (R. 31, 41; Tr. 218, 225, 226). Had that been the case, however, Leshe could have referred the Allens to Golden State pursuant to Foreman Ross' request on August 30 and the problems inherent in concurrent registration and conforming to respondent's dispatch rules would not have arisen.[6] Further, when Richard Allen insisted on registration on the out-of-work list, Leshe continued to refuse.[7] Respondent's claimed concern about multiple job registrations is further belied by the fact that when Cook, also a member of a sister local, appeared in respondent's hall on August 30 and offered to "put in" his book, thus transferring his membership to Local 180, Leshe made no inquiry as to Cook's possible concurrent registrations. Instead, he accepted Cook's book and promptly added his name to the out-of-work list.

In sum, we submit that there is substantial evidence indicating respondent's unlawful motivation, to wit, a purpose to prefer members of Local 180 or persons from other locals

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[6]The Trial Examiner, with the Board's affirmance, refused to credit Leshe's testimony that he tried to communicate with the Allens and Look by telephone, but without success, before Cook and Wadley were dispatched (R. 28-29).

[7]Despite his prior testimony evidencing his readiness to register an individual even though registered elsewhere if he persisted in his demands (Tr. 240, 255, 256), Leshe claimed Allen could not be physically present during dispatch hours. On cross examination, Leshe conceded that Local 180 has no rule denying registration to members who are concurrently registered in other locals, and that Allen could have chosen to be present at the appropriate dispatch hours (R. 31; Tr. 254, 255).

who transfer membership to Local 180.[8] Such preferences are reasonably calculated to cause, and do cause, discrimination with regard to such non-members' dispatch and hire with the consequent effect of discouraging retention of membership in sister locals, while encouraging membership in respondent. It is well settled that such union conduct is violative of Section 8(b)(2) and (1)(A) of the Act. See, *N.L.R.B. v. Local 507, International Hod Carriers' Building and Common Laborers' Union, supra,* 336 F.2d 460 (C.A. 9); *N.L.R.B. v. Local 269, International Brotherhood of Electrical Workers,* 357 F.2d 51, 55-56 (C.A. 3).

In *N.L.R.B. v. International Brotherhood of Electrical Workers, Local Union 340, supra,* upholding a Board finding that "the refusal to refer a member of a sister local was motivated by a desire to prefer members of Local 340, or other 'wireman's' locals, over members of 'railroad' locals," this Court recognized that "evidence tending to prove unlawful motivation must ordinarily be circumstantial in character. It is not expected that the officers or representatives of a union will record unlawful motivation in such a way as to constitute direct evidence." 301 F.2d at 825.

In sum, we submit that the record amply supports the Board's finding that respondent violated Section 8(b)(2) and (1)(A) of the Act by operating its exclusive hiring hall in such a manner as to discriminate against Paul and Richard

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[8] Leshe equated getting on the out-of-work list with transferring membership: ". . . getting on the list means transferring membership" (Tr. 262, 263). He was unable to name any sister local members who had been registered on the list without becoming members of Local 180 (Tr. 220, 221).

Allen and Dick Look because of their lack of membership in Local 180.[9]

II. THE BOARD PROPERLY REJECTED THE DEFENSE THAT IT SHOULD WITHHOLD STATUTORY RELIEF BECAUSE OF THE FAILURE OF THE COMPLAINANTS TO EXHAUST POSSIBLE REMEDIES UNDER CONTRACTUAL GRIEVANCE PROCEDURES

As an affirmative defense, respondent asserted that the failure of the employees to exhaust the contractual grievance procedures constituted reason for the Board to withhold relief under the Act.[10] As we show below, the Board properly rejected this contention.

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[9] In large part, the Board's conclusions herein represent evaluations as to credibility. *N.L.R.B. v. I.B.E.W., Local Union 340, supra,* 301 F.2d at 827. Concerning the credibility resolutions of a Trial Examiner, this Court has said: "Credibility is peculiarly the province of the Trial Examiner[and] his evaluation of oral evidence as reliable will not be disturbed unless the testimony which he credits is hopelessly or inherently incredible." *N.L.R.B. v. International Longshoremens' and Warehousemens' Union, Local 10, et al., supra,* 283 F.2d at 562.

[10] Section IV(B)(10) of the AGC Agreement (G.C. Exh. 2) provides that any person aggrieved by the operations of the hiring arrangements of Section IV has the right to submit, in writing, his grievance to a Joint Adjustment Board within ten days after the occurrence of the grievance. That Board has full power to adjust the grievance, and its decision thereon is final and binding upon the person submitting the grievance and all parties to the contract. Section VII (G.C. Exh. 2) sets out the entire machinery and composition of the Joint Adjustment Board for the settlement of grievances.

Congress and the courts have sought to ensure the enforcement of public rights guaranteed to individual employees, their unions, and their employers under the Act. Section 10(a) empowers the NLRB to prevent any person from engaging in an unfair labor practice with the proviso that, "This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise. . ." The language of the Act itself, as well as the Court decisions affirming the Board's interpretation of this Section make clear that the jurisdiction of the Board to decide whether unfair labor practices have occurred may not be restricted by the availability of contract grievance adjustment procedures. *N.L.R.B. v. C & C Plywood Corp.*, 385 U. S. 421; *N.L.R.B. v. Acme Industrial Co.*, 385 U. S. 432; *N.L.R.B. v. Thor Power Tool Co.*, 351 F.2d 584, 587 (C.A. 7).[11]

Notwithstanding this national policy, and the Board's duty under the Act, to prevent and suitably remedy unfair labor practices, there is likewise a public policy favoring the voluntary adjustment of disputes arising over the application or interpretation of collective bargaining agreements.[12] The Board has sought to strike a balance between these two national goals in various types of cases in which arbitration has

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[11] "The superior authority of the Board may be invoked at any time." *Carey v. Westinghouse Elec. Corp.*, 375 U. S. 261, 272.

[12] See, 29 U.S.C., Section 173(d); *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564; *United Steelworkers v. Warrior and Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U. S. 593 ("The Steelworkers Trilogy").

taken place, adopting a deference to arbitral results when the arbitration "proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg Manufacturing Co.*, 112 NLRB 1080, 1082. However, the Board has emphasized that it has the "undoubted authority to adjudicate unfair labor practice charges" (*Raley's Inc.*, 143 NLRB 256, 257) and will withhold acting in a particular case only in an exercise of discretion. That this position of the Board is clearly in accord with the 1960 trilogy of cases involving Section 301,[13] appears from a more recent Supreme Court decision in *Local 174, Teamsters v. Lucas Flour Co.*. 369 U. S. 95. The Court, in *Local 174,* emphasized that its earlier decisions were in no way intended to deprive the Board of its jurisdiction, for as the Court specifically pointed out: "It is, of course, true that conduct which is a violation of a contractual obligation may also be conduct constituting an unfair labor practice, and what has been said is not to imply that enforcement by a court of a contract obligation affects the jurisdiction of the NLRB to remedy unfair labor practices as such." 369 U. S. at 101. Accord: *Smith v. Evening News Ass'n.*, 371 U. S. 195, 197.

It is thus settled that where the Board has jurisdiction over an unfair labor practice, the extent to which that jurisdiction will be exercised is a matter of administrative policy within the discretion of the Board. The courts will not overturn the exercise of such discretion in the absence of a showing that the Board has abused it. *Haleston Drug Stores v. N.L.R.B.*, 187 F.2d 418, 421 (C.A. 9), cert. denied, 342 U. S.

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[13] See cases cited, *supra,* n. 12.

815; *Lummus Co. v. N.L.R.B.*, 339 F.2d 728, 732-733 (C.A. D.C.); *N.L.R.B. v. Hershey Chocolate Corp.*, 297 F.2d 286, 293 (C.A. 3); *Thor Power Tool Co., supra*, 351 F.2d 584, 587. No such showing can be made here.

Although respondent contends that the employees failed to exhaust the contractual grievance remedies, the record shows that the employees made every reasonable attempt, within the union organization and within the range of their knowledge, to attain an informal resolution of their problem.[14] Further, when Paul Allen consulted Joe Edwards, the employees' local business representative, about doing something about Local 180, Edwards suggested that the employees handle it themselves but did not suggest the filing of any grievance.[15] At a later meeting with Union Representative La Chappelle concerning the possibility of a settlement, there was no mention of the possibility of the dispute being submitted to a joint adjustment board, pursuant to Section IV (B)(10) of the AGC Agreement (R. 35; Tr. 154).

The Board does not relinquish jurisdiction over unfair labor practices merely because a party had the contractual right to go to arbitration but has never exercised the option. *Puerto Rico Telephone Co.*, 149 NLRB 950; *Aerodex, Inc.*, 149 NLRB 192; *Local Union 469, Plumbers, et al.*, 149 NLRB

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[14] Look testified that though he was given a copy of the Agreement to look at, he had not come across the grievance provision (Tr. 59, 60). Further, when questioned as to whether he had availed himself of the contract grievance procedure, Richard Allen testified that he "does not know what a grievance is" (Tr. 114).

[15] Paul Allen also testified that Victor La Chappelle, then a representative, of the California State Council of Carpenters, called it a "local matter" and referred them back to Edwards (R. 35; Tr. 146).

39; *Superior Roofing Co.,* 158 NLRB 657. In *Superior Roofing Co., supra,* involving the same AGC Agreement and contract provision that is involved in the case at hand, the Board specifically held that failure to exhaust the grievance procedure was not a bar to the Board's exercise of jurisdiction (158 NLRB at 661, n. 6).

The fact that the alleged unfair labor practice in the instant case was also asserted by respondent to involve a question of contract interpretation does not require a different result. A decision by the Board to defer a case to arbitration is largely based on the reasonable assurance that the unfair labor practice issues will be adequately treated in the private proceedings and that the rights of the individual will be properly considered. However, when the unfair labor practice in question concerns employees' Section 7 rights, the Board has usually seen fit to exercise jurisdiction. See cases cited, *supra.* Indeed, since "job discrimination strikes at the very heart of rights guaranteed employees by the Act," to defer this type of issue to arbitration would not effectuate the policies of the Act. Taking into consideration the important part hiring halls play in the hiring process of large sectors of American industry, it is important from a public interest viewpoint that "findings of unlawful hiring hall discrimination be harnessed to suitable cease and desist orders restraining such misconduct in the future." *Local Union 469, Plumbers, supra,* 149 NLRB at 46. That this is rightly the role of the Board and the subsequent judicial enforcement of its orders was suggested in *Square D Company v. N.L.R.B.,* 332 F.2d 360 (C.A. 9), where this Court dealt with the issue of whether the Board should defer to arbitration with regard to the question of whether a company under its collective bargaining agreement has to supply information requested by the union. The Court acknowledged that "if the dispute in question . . . was a controversy over the applicability or violation of a duty not only prescribed by the contract

but also imposed directly by the Act, disregard of which would constitute an unfair labor practice," — such as a provision in a contract prohibiting the employer from discriminating against an employee because of his union membership — the Board would not be compelled to defer to arbitration. The Court stated (332 F.2d at 364):

> Since Sec. 8(a) of the Act carries a similar proscription the Board itself would have full power to determine the existence of, and to prevent, such discriminatory action.

It is submitted that no different result is called for in this case of "job discrimination" by the Union, even though the Union's conduct may also be a violation of its contractual obligation to operate an "open and non-discriminatory employment list" (G.C. Exh. 2, Sec. 4(B)(1)).

The contract language itself provides further reason for rejecting respondent's defense. In the present situation, discriminatorily treated job applicants are asked to submit their case to a joint board where they are not represented. They would have to carry their case before a bi-partisan tribunal in the selection of whose members they have no voice and which contains no truly disinterested person. Only if the representatives of the Union and the employer on the joint adjustment board cannot agree is there provision for the addition of an impartial fifth representative. But even then, the fifth member is chosen by the other members of the Board and a decision, final and binding, is determined by a majority of these members. This case thus represents an even stronger showing of lack of impartiality to the aggrieved employee than did *Lummus Co. v. N.L.R.B.*, 339 F.2d 728, 732-733 (C.A. D.C.), where, in the event of a deadlock, an *impartial* arbitrator could have been appointed to make the final decision.

Respondent attempted before the Board to distinguish the *Lummus* case, *supra,* on the ground that there representatives of the local union and the employer against whom the charges were filed would constitute the appeals board, while here, since neither Local 180 nor Golden State were identified as the "union" or "employer" for purposes of the joint adjustment board provision, there was no showing that a lack of impartiality was inevitable. However, as the Board noted, a claim of discriminatory exclusive hiring hall practices "inevitably imputes misconduct to the contracting parties." Contractual grievance provisions such as these "obviously have the effect of placing the [grievant] at the mercy of agents of parties that have a community of interest and are charged, either directly or indirectly, with the misconduct" (R. 42). Contrary to respondent's assertion, there is no reason to assume that the International Union and the AGC would be more impartial or objective than the constituent local unions or employer-members they represent.

We submit that, as the question is one as to the propriety of the Board's exercise of discretion, the Board acted reasonably when it assumed jurisdiction to protect the public and individual rights affected in this present controversy, and, accordingly, that the Board's action was neither arbitrary nor capricious.

CONCLUSION

For the reasons stated above, it is respectfully submitted that a decree should issue, enforcing the Board's order in full.

Respectfully submitted,

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January 1968

National Labor Relations Board

CERTIFICATE OF SERVICE

The undersigned certifies that he has examined the provisions of rules 18 and 19 of this Court, and in his opinion the tendered brief conforms to all requirements.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows'

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

* * *

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents —

> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

APPENDIX B

INDEX TO REPORTER'S TRANSCRIPT

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GENERAL COUNSEL'S EXHIBITS

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3	15	14	15
4	20	20	20
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